Fajar Menyensing Sdn Bhd v Angsana Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R3-24-60 OF 1995
NIK HASHIM J
11 MARCH 1998

Contract *— Building contract — Termination — Service of notice of — Contract provides that notice be given by registered post or recorded delivery — Notice was hand delivered instead — Whether provisions governing service of notices mandatory or directory — Whether notice was valid*

Contract *— Building contract — Termination — Notice of — Whether events of default must be specified or architect's opinion that default occurred suffices — Whether notice was valid*

The plaintiff as the contractor and the defendant as the employer had entered into a standard building contract ('the contract') for the construction of a housing scheme ('the works'). The defendant's architect by way of a letter dated 19 July 1988 gave notice that in the architect's opinion, the plaintiff had failed to proceed regularly and diligently in execution of the works. The notice was hand delivered to the plaintiff. By a subsequent letter dated 11 August 1988, a fresh notice was issued to the plaintiff requesting that the plaintiff proceed regularly and diligently with the works. This was also delivered by hand to the plaintiff. Finally, by a letter dated 30 August 1988, which was delivered by hand and received by the plaintiff, the defendant gave notice of termination of the contract (collectively referred to as 'notices of determination'). The matter then proceeded to arbitration. The arbitrator, pursuant to s 22(1)(a) of the Arbitration Act 1952 referred two questions by way of case stated for determination by the High Court. The issues were whether: (i) the notices of determination by both the defendant and its architect were invalid because they were delivered by hand rather than in accordance with the provisions of cl 25(1) of the contract (which provided for notices of determination to be given by registered post or recorded delivery); and (ii) the notices of determination were invalid as they were based merely on the architect's opinion or relied upon the same as the basis for determination.

Held, answering both the questions in the affirmative:

(1) Clause 25(1) of the contract clearly required the architect's and defendant's notices to be given by the plaintiff by registered post or recorded delivery. The notices of determination received by hand contravened the express provision of cl 25(1) and were hence invalid. The mode of service as provided by cl 25(1) was a mandatory provision which must be strictly observed. The contract was a standard form of contract which the parties had chosen to use and they were thus bound by its provisions (see

p 87A–D); *Eriksson v Whalley* [1971] 1 NSWLR 397 and *Central Provident Fund Board v Ho Bock Kee* [1981] 2 MLJ 162 followed; *Yates Building Co Ltd v Pulleyn & Sons (York) Ltd* (1977) 51 ALJ 95, *Kennedy v Collings Construction* (1991) 7 B & CL 25 and *Goodwin & Sons v Fawcett* (1945) EG 186 not followed.

(2) With regard to the second issue, cl 25(1) of the contract expressly provided that the architect may give a notice to the plaintiff specifying the default. As such, the architect's notice must clearly specify the default of the plaintiff. The clause did not empower the architect to issue a notice of default based on his opinion but only if the plaintiff had as a matter of fact made a default in one or more of the matters enumerated in cl 25(1). The default and determination notices were serious documents and should be treated seriously and firmly. Assertions of facts were needed and not mere opinions. Moreover, circumstances wherein the architect was empowered to act based on his opinion were expressly provided for in the contract and when compared to cl 25(1), it was clear that under cl 25(1) the architect was not empowered to act based on his opinion (see pp 87E–H and 88D–E).

Obiter:

Clause 25(1) required notice to be given by 'registered post' or 'recorded delivery'. However, recorded delivery service is non-existent in Malaysia and accordingly therefore is to be disregarded. The rest of the clause would be enforced accordingly (see p 87B).

[Bahasa Malaysia summary

Plaintif sebagai kontraktor dan defendan sebagai majikan telah mengikat satu kontrak bangunan yang standard ('kontrak tersebut') bagi pembinaan suatu skim perumahan ('kerja-kerja tersebut'). Arkitek defendan melalui sepucuk surat bertarikh 19 Julai 1988 telah memberi notis bahawa menurut pendapat arkitek tersebut, plaintif telah gagal untuk meneruskan pelaksanaan kerja-kerja tersebut dengan tetap dan tekun. Notis tersebut telah dihantar dengan serahan tangan kepada plaintif. Melalui sepucuk surat yang berikutnya bertarikh 11 Ogos 1988, satu notis baru telah dikeluarkan kepada plaintif yang meminta supaya plaintif meneruskan kerja-kerja tersebut dengan tetap dan tekun. Notis ini telah juga dihantar dengan serahan tangan kepada plaintif. Akhirnya, melalui sepucuk surat bertarikh 30 Ogos 1988, yang telah dihantar dengan serahan tangan dan diterima oleh plaintif, defendan telah memberikan notis penamatan kontrak tersebut (secara kolektifnya dirujuk sebagai 'notis-notis penentuan'). Perkara tersebut kemudiannya telah beralih kepada timbangtara. Penimbangtara, menurut s 22(1)(a) Akta Timbangtara 1952 merujuk dua persoalan melalui kes yang dinyatakan untuk keputusan oleh Mahkamah Tinggi. Isu-isu tersebut adalah sama ada: (i) notis-notis penentuan oleh kedua-dua defendan dan arkiteknya adalah tak sah

kerana ia dihantar dengan serahan tangan dan tidak menurut peruntukan-peruntukan fasal 25(1) kontrak tersebut (yang mana memperuntukkan bahawa notis-notis penentuan hendaklah diberikan melalui pos berdaftar atau penghantar-serahan tercatat); dan (ii) notis-notis penentuan adalah tak sah kerana ia semata-mata berdasarkan pendapat arkitek atau bergantung kepada perkara yang sama sebagai asas untuk penentuan.

Diputuskan, menjawab dengan mengiakan kedua-dua persoalan tersebut:

(1) Fasal 25(1) kontrak tersebut dengan jelas menghendaki notis-notis arkitek dan defendan diberikan kepada plaintif melalui pos berdaftar atau penghantar-serahan tercatat. Notis-notis penentuan yang telah diterima dengan serahan tangan melanggari peruntukan nyata fasal 25(1) dan dengan itu adalah tak sah. Cara penyampaian sepertimana yang diperuntukkan oleh fasal 25(1) adalah satu peruntukan mandatori yang mesti dipatuhi dengan ketatnya. Kontrak tersebut adalah satu bentuk kontrak yang standard yang mana telah dipilih oleh pihak-pihak tersebut untuk digunakan dan dengan itu mereka adalah terikat oleh peruntukannya (lihat ms 87A–D); *Eriksson v Whalley* [1971] 1 NSWLR 397 dan *Central Provident Fund Board v Ho Bock Kee* [1981] 2 MLJ 162 diikut; *Yates Building Co Ltd v Pulleyn & Sons (York) Ltd* (1977) 51 ALJ 95, *Kennedy v Collings Construction* (1991) 7 B & CL 25 dan *Goodwin & Sons v Fawcett* (1945) EG 186 tidak diikut.

(2) Berhubung isu kedua, fasal 25(1) kontrak tersebut dengan nyatanya memperuntukkan bahawa arkitek tersebut boleh memberikan notis kepada plaintif menyatakan dengan khususnya kemungkiran tersebut. Oleh yang demikian, notis arkitek tersebut mestilah dengan jelasnya menentukan kemungkiran plaintif. Fasal tersebut tidak memberi kuasa kepada arkitek untuk mengeluarkan notis kemungkiran berdasarkan pendapatnya tetapi hanya jika plaintif telah pada hakikatnya melakukan kemungkiran dalam satu atau lebih daripada perkara-perkara yang disebutkan satu per satu dalam fasal 25(1). Kemungkiran tersebut dan notis-notis penentuan adalah dokumen-dokumen yang serius dan seharusnya dilayan secara serius dan dengan tegas. Penegasan-penegasan fakta adalah diperlukan dan bukannya semata-mata pendapat sahaja. Lagipun, keadaan-keadaan dalam mana arkitek tersebut diberi kuasa untuk bertindak berdasarkan pendapatnya adalah diperuntukkan dengan nyata dalam kontrak tersebut dan apabila dibandingkan dengan fasal 25(1), ia adalah jelas bahawa di bawah fasal 25(1), arkitek tersebut adalah tidak diberi kuasa untuk bertindak berdasarkan pendapatnya (lihat ms 87E–H dan 88D–E).

Obiter:

Fasal 25(1) menghendaki supaya notis diberikan melalui 'pos berdaftar' atau 'penghantar-serahan tercatat'. Walau bagaimanapun,

penyampaian penghantar-serahan tercatat tidak wujud di Malaysia dan sehubungan itu seharusnya tidak dihiraukan. Yang selebihnya daripada fasal tersebut akan dikuatkuasakan sehubungan dengannya (lihat ms 87B).]

Notes

For cases on building contract, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1696–1815.

Cases referred to

Central Provident Fund Board v Ho Bock Kee [1981] 2 MLJ 162 (folld)
Eriksson v Whalley [1971] 1 NSWLR 397 (folld)
Goodwin & Sons v Fawcett (1945) EG 186 (not folld)
Hounslow London Borough Council v Twickenham Garden Developments Ltd [1971] Ch 233 (refd)
Kennedy v Collings Construction (1991) 7 B & CL 25 (not folld)
Yates Building Co Ltd v Pulleyn & Sons (York) Ltd (1977) 51 ALJ 95 (not folld)

Legislation referred to

Arbitration Act 1952 s 22(1)(a)
Rules of the High Court 1980 O 69

Vinayak P Pradhan (*YY Chee* with him) (*Shatar Tan & Chee*) for the plaintiff.
Varghese George (*Zain & Co*) for the defendant.

Cur Adv Vult

Nik Hashim J: This is an application by way of an originating summons pursuant to O 69 of the Rules of the High Court 1980 and s 22(1)(a) of the Arbitration Act 1952 ('the Act') where at the request of both parties, the arbitrator has stated a special case for the decision of this honourable court.

Briefly, the plaintiff and the defendant are parties to a building contract for the execution of works known as the 'proposed housing scheme at Kepong Mukim Batu, for 90 units of double-storey link house'. The terms and conditions of the contract, inter alia, included the terms and conditions set out in the standard form of Agreement and Schedule of Conditions of Building Contract issued under the sanction of Pertubuhan Akitek Malaysia and the Institution of Surveyors ('the contract'). During the execution of the works by the plaintiff ('the contractor') under the contract, the defendant ('the employer') purported to exercise its right under cl 25(1) of the contract to determine the plaintiff's employment. The defendant's architect, by a letter dated 19 July 1988 gave notice that in the architect's opinion,

the plaintiff had failed to proceed regularly and diligently in execution of the works. The notice was delivered by hand to the plaintiff. By another letter dated 11 August 1988, a fresh notice was issued by the said architect requiring the plaintiff to proceed regularly and diligently. This notice was also delivered by hand to the plaintiff. By a letter dated 30 August 1988 (typed at the top) and 1 September 1988 (in ink at the end of the letter), the defendant gave notice of termination of contract which was delivered by hand and received by the plaintiff.

The questions which have been reformulated by the parties for the decision of this court are:

(1) whether the architect's notices dated 19 July 1988 and 11 August 1988 and the defendant's notice of termination dated 30 August 1988 (1 September 1988) are invalid because they were delivered by hand to the plaintiff;

(2) whether the architect's notices dated 19 July 1988 and 11 August 1988 and the defendant's notice of termination dated 30 August 1988 (1 September 1988) are invalid because they were given based on the 'opinion' of the architect and/or the opinion of the architect is referred to therein.

With regard to the first question, En Vinayak P Pradhan for the plaintiff argued that the notices are invalid because they were delivered by hand to the plaintiff. The defendant's purported termination of the plaintiff's employment under the contract is thus invalid on the ground that the procedure for a valid termination prescribed by cl 25(1) of the contract had not been complied with.

Encik Varghese George, for the defendant, on the other hand, submitted that the mode of service of the notices to be by way of 'registered post or recorded delivery' are to be regarded as being directory only and therefore the notices were valid and effectively issued on the plaintiff.

In order to resolve the above questions, I consider it necessary to reproduce cl 25(1) of the contract which provides:

> If the contractor (plaintiff) shall make default in any one or more of the following respects, that is to say:
>
> (a) if he without reasonable cause wholly suspends the carrying out of the works before completion thereof; or
>
> (b) if he fails to proceed regularly and diligently with the works; or
>
> ...
>
> then the *architect may give to him a notice by registered post or recorded delivery specifying the default*, and if the contractor either shall continue such default for 14 days after receipt of such notice or shall at any time thereafter repeat such default (whether previously repeated or not), then the employer without prejudice to any other rights or remedies, may within ten days after such continuance or repetition *by notice by registered post or recorded delivery* forthwith determine the employment of the contractor under this contract provided that such notice shall not be given unreasonably or vexatiously. (Emphasis added.)

A It is obvious by its provision and the marginal note that cl 25(1) is a determination clause and as such, it must be construed strictly. Its provision is mandatory in nature. Therefore, any formal or procedural requirements stipulated in the determination clause must be complied with exactly and meticulously. *Hudson's Building and Engineering Contracts* (11th Ed, 1995) Vol 2, p 1244 said:

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> ... *exact and meticulous compliance by the determining party with any formal or procedural requirements* laid down in the termination clause, for example, as to notices or time limits, *will usually be required if a contractual termination is to be successful* ... . (Emphasis added.)

C Clause 25(1) clearly requires the architect's and the defendant's notices are to be given to the plaintiff by 'registered post or recorded delivery'. However, recorded delivery service is non-existence in Malaysia. In United Kingdom, recorded delivery service exists and is a postal service provided by the post office pursuant to the Recorded Delivery Service Act 1962. Hence, the words 'recorded delivery' which appear in cl 25(1) which are D adopted from the United Kingdom are meaningless in Malaysia and should be ignored. *Keating on Building Contracts* (5th Ed, 1991) at p 22 states that:

> An apparent agreement containing meaningless words may be treated in one of three ways: the meaningless words may be ignored and the rest of the E clause in which they appear enforced ... .

Counsel for the defendant urged the court to adopt a common sense, business-like and purposive interpretation on the mode of service. According to him, service by hand is equally valid and effective and cited *Kennedy v Collings Construction Co Pty Ltd* (1991) 7 B & CL 25 in support. In that F case, the Australian standard form permitted notice by ordinary post for the first default notice but stipulated registered mail for the determination notice. Cole J distinguished *Eriksson v Whalley* [1971] 1 NSWLR 397 and held that the second determination notice which had unquestionably been received was fully effective in the absence of service by registered mail. Although only one mode 'by registered mail' was specified, the learned G judge went on to state:

> In my view, the provision of registered mail should be seen as facultative, permitting notice of determination of the builders employment by registered mail rather than by the perhaps more onerous course of personal service but not obligatory. As a matter of construction of the June contract, I think it is H sufficient if the notice determining the employment of the builder be given by any other means which is shown to have resulted in receipt of the notice by the builder.

There seems to be no decided case binding on this court on this issue. The cases from other jurisdictions appear to conflict with each other. The I English cases suggest that provisions on the mode of service are merely directory while the Australian and Singapore cases suggest that such provisions are mandatory and therefore obligatory.

In *Eriksson*, a special case stated for the decision of the Australian court was on whether the mechanical requirements of the determination

clause had been validly invoked by the proprietor's architect. The determination clause required the architect's notice to be given by registered post but was not so given. Collins J held that the notice of default was bad because it was not given by registered post as required by the contract. The learned judge at p 399 said:

> Clause 19 (the determination clause) then provides for the rights and duties of the proprietor and the builder in the event that the contract is terminated in accordance with the above provisions ... they give the proprietor rights in excess of those he would have at common law. It is reasonable to assume that the stringency of these provisions led to the formulation of the principle that the power to forfeit, whether given to the employer, the architect or engineer, will be strictly construed ... *RB Burden Ltd v Swansea Corp* [1957] WLR 1167 is the authority cited for this proposition.

In *Central Provident Fund Board v Ho Bock Kee* [1981] 2 MLJ 162, the Singapore Court of Appeal considered the Australian case of *Eriksson*, the English case of *Yates Building Co Ltd v Pulleyn & Sons (York) Ltd* (1977) 51 ALJ 95 and another English case of *Goodwin & Sons v Fawcett* (1945) EG 186 which decided that the provisions for giving of the notice of determination by registered post was not mandatory and that such a notice given by recorded delivery was valid. The Singapore Court of Appeal decided to follow the Australian case of *Eriksson* and not the English cases and held that both the notice of default and the notice of determination which were sent by hand and not by registered post as required in the determination clause were invalid.

The purpose of the requirement of registered post is for the protection of the contractor in that he is duly warned that the determination procedure has been operated and must take immediate steps to rectify the specified defaults within the time-limit prescribed in the clause. In this regard, I share the view expressed by Collins J in *Eriksson* that the provision of this method of service no doubt was intended for the purpose of avoiding subsidiary disputes between the parties to the contract as to whether the notice was given or received as it provides for a mode of service and receipt of the required notice which can be corroborated from an independent and official source.

Professor Vincent Powell-Smith in his book *The Malaysian Standard Form of Building Contract* (PAM/ISM 69) at p 110 said:

> Because of the seriousness of the consequences of action under cl 25(1), it is suggested that the strict letter of the clause should be followed. A wrongful or otherwise invalid determination of the contractor's employment would amount to a repudiatory breach of contract by the employer. In particular, *the times laid down and the contents of the notices should be strictly observed, and so should the requirement as to service by registered post or recorded delivery* ... .
>
> Although there are English decisions which suggest that the contract provisions about the mode of service are merely directory and not mandatory as the words suggest ... *the contrary view has been taken in New South Wales and in Singapore and is to be preferred.* (Emphasis added.)

Thus, having considered the submissions of both parties and the authorities cited, it is my judgment that the notices delivered by hand and received by the plaintiff contravene the express provision of cl 25(1) and hence invalid. The contract in the instant case is a standard form contract which the plaintiff and the defendant chose to use, and as such, they are bound by its provisions. Clause 25(1) clearly stipulates that the architect's default notice and the defendant's notice of termination are to be given to the plaintiff by 'registered post or recorded delivery'. Since recorded delivery service is non-existent in Malaysia, it is therefore to be disregarded. Service by hand is not a recorded delivery. Neither is it provided for in the contract. Thus, the only service that is left available and practical which is required by cl 25(1) is by means of registered post. So, following the cases of *Eriksson* and *Central Provident Fund Board* and the preferred view of Prof Vincent Power-Smith, I hold that the mode of service by registered post should be strictly observed. It is a mandatory requirement and hence obligatory on the part of the respondent to follow it. Failure to comply with the prescribed mode of service is fatal. Service by any other means other than by registered post is invalid. Thus, the answer to the first question must be in the affirmative.

With regard to the second question, ie whether the notices are invalid because they were given based on the opinion of the architect and/or the opinion of the architect is referred to therein, I wish to refer again to the provisions of cl 25(1) for the determination of the question. Clause 25(1) of the contract expressly provides that the architect may give to the contractor (plaintiff) a notice by registered post or recorded delivery specifying the default. In other words, the architect notice must clearly specify the default of the plaintiff. In the instant case, the architect in his notices had merely relied upon his 'opinion' that the plaintiff had failed to proceed regularly and diligently in the execution of the works. However, cl 25(1) does not empower the architect to issue a notice of default based on his opinion but only if the plaintiff has as a matter of fact made a default in one or more of the matters provided therein.

Moreover, in those circumstances where the architect is empowered to act based on his opinion, express provisions have been made for the same under the contract. Examples are cl 15(1) ('when in the opinion of the architect that the works are practically completed ...'); cll 15(4) and 16(c) ('when in the opinion of the architect any defects ...'); cl 22 ('... and the architect certifies in writing that in his opinion ... '); cl 23 ('... if in the opinion of the architect the completion ...'); cl 24(1) ('... the architect is of the opinion ...'). When compared with these provisions, cl 25(1) clearly does not empower the architect to act based merely on his opinion. Counsel for the defendant contends that the notice issued by the architect that contain the statement '... in my opinion ...' does not lessen the effect of the architect's notice in any way and quoted *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233 where Megarry J at p 266 said:

> The words, 'You have failed to proceed regularly and diligently with the works' are plainly factual, and would clearly satisfy this branch of Mr Neill's

> argument. The question is whether they are deprived of this effect merely because they are prefaced by the words 'in my opinion', the opinion being that of the architect. I cannot think that they are. The essence of a notice is to convey information in a definite form, and I do not see why the notice should be any the less one 'specifying the default' because it is expressed as being the architect's opinion. No intelligible reason was suggested for making a distinction of this sort, and I can see none. I do not think that if I were to say to Mr Neill, 'In my opinion your submission is wrong' he would regard these words as being any the less decisive than the more abrupt and less courteous assertion, 'Your submission is wrong'. I need say no more than that. I reject the submission.

Authorities discussed earlier show that a determination clause, where cl 25(1) is one, must be strictly construed and the determination procedure strictly followed. Exact and meticulous compliance by the determining party with any formal or procedural requirements laid down in the termination clause must be followed. The contents of the notices must also be strictly observed. Thus, applying these principles to the present case, I hold that the architect's notices are defective and hence invalid. Clause 25(1) does not empower the architect to issue the default notice based on his opinion. The default and termination notices are serious documents, and as such, they should be treated seriously and firmly. In my view, courteous assertion has no place in the default and determination notices. What is needed is assertion of facts and not opinions.

With respect, I agree with counsel for the plaintiff that by reason of the words 'in my opinion' in the architect notices, the said notices are invalid. The defendant's notice of termination is equally invalid having been given based on the opinions of the architect. Therefore, the termination notice plainly cannot take effect unless the architect's notice is valid. Thus, the answer to the second question is also in the affirmative. So are my answers to the questions posed.

I make no order as to costs.

Order accordingly.

Reported by Lew Chee Seong